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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 568

CHARLES EDWARD ANDERSON BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 15–22) is reported at 295 F. 2d 192.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1961. The petition for a writ of certiorari was filed on November 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case the trial judge properly exercised his discretion in declining

to look at the grand jury testimony of the complaining witness in order to search for possible impeaching material.

STATEMENT

Petitioner was convicted by a jury in the District Court for the Eastern District of Missouri on a one-count indictment charging him with interstate transportation of a girl for immoral purposes in violation of 18 U.S.C. 2421 (I R. 1, 32).[1] He was sentenced to imprisonment for three years and fined $5,000 (I R. 41). On appeal, the conviction was unanimously affirmed (III R. 1–8).[2]

1. *The Crime.*—Petitioner met Janice Escalanti in Juarez, Mexico, on December 1, 1959 (II R. 15). At that time, Miss Escalanti was a fourteen-year-old Indian who had received an eighth-grade education on a reservation (II R. 14–15). Petitioner was on tour with a small band as a "rock and roll" singer (II R. 24). Miss Escalanti told petitioner that she was twenty-one years of age and had been a prostitute and would like to reform (II R. 21, 57). Petitioner offered her a job as a "hat check" girl in his club

[1] The record consists of three separately numbered volumes. Volume I, which will be designated as "I R.," contains the district court proceedings. Volume II, which will be designated as "II R.," is the trial transcript. Volume III, which will be designated as "III R.," contains the proceedings in the court of appeals.

[2] This was the second trial. The first conviction was reversed by the court of appeals because of the attitude of the trial judge toward petitioner. *Berry* v. *United States*, 283 F. 2d 465, certiorari denied, 364 U.S. 934. The second trial was before a different judge (I R. 29, 53–54).

in St. Louis (II R. 21). Petitioner transported Miss Escalanti in his car from El Paso, Texas (II R. 18–19), to Tucson, Arizona (II R. 25), to Phoenix, Arizona (II R. 35), to Santa Fe, New Mexico (II R. 36), to Denver, Colorado (II R. 37), to Pueblo, Colorado (II R. 42), and to St. Louis, Missouri, by way of Kansas City (II R. 42, 44).

During this trip petitioner had intercourse with the girl at the hotel or motel stops (II R. 29–30, 34, 41) and also in the car between cities (II R. 36–38). While working at petitioner's club in St. Louis, Miss Escalanti stayed with a Miss Francine Gillium, who managed the club (II R. 46, 293). During this stay at St. Louis, petitioner had intercourse with Miss Escalanti every night (II R. 48). On December 18, 1959, petitioner bought Miss Escalanti a bus ticket to El Paso, Texas, gave her $5, and left her at the bus station (II R. 48–49). She wanted to go to Yuma where she had previously lived with her grandmother and father but petitioner would give her a ticket only to El Paso (II R. 50, 15). She met a man who bought her some drinks (II R. 51), and did not depart on the bus. When she reappeared at petitioner's club in St. Louis that night, he took the bus ticket from her (II R. 51). She stayed in town until on December 22 she called the Yuma police, who told her to wait until the St. Louis police picked her up (II R. 52–54).

The government corroborated Miss Escalanti's testimony by various witnesses. A bellboy in Tucson, Arizona, testified that, when delivering food, he saw Miss Escalanti in bed, petitioner clad with only a

pair of slacks, and the other bed in the room still made up (II R. 119–122). One of the musicians on the tour testified that petitioner occupied a room with Miss Escalanti on the tour (II R. 153, 160) and that only one of two beds in that room had been slept in (II R. 156). Another musician on the tour (II R. 182) testified that Miss Escalanti stayed in petitioner's room at various stops (II R. 185; see also II R. 187–188). A hotel clerk in Denver testified that petitioner registered in one room with one bed as "Mr. and Mrs. Janet Johnson" (II R. 197–199) and occupied the room with Miss Escalanti (II R. 201; see also II R. 205–206).

Petitioner admitted transporting Miss Escalanti and occupying the same rooms with her but denied having intercourse (II R. 241–242, 244, 246, 248, 251–252, 257–258).

2. *The Request for Inspection of Grand Jury Minutes.*—At the conclusion of Miss Escalanti's direct testimony, petitioner's counsel requested that the government produce any statements she had given the government and also that the trial court examine the grand jury minutes in camera to see "if there is any impeaching or contradictory matter therein" (II R. 54–55). The court sustained the motion as to the statements but declined to inspect the grand jury minutes (II R. 55–56). The government supplied petitioner's counsel with two signed statements which had been taken by the F.B.I. (II R. 56).[1]

[1] Petitioner's counsel also had available the trial transcript of the first trial (II R. 94–96, 101, 105–106, 141–143), as well as information from statements Miss Escalanti had made to the St. Louis police (II R. 83, 127).

The following day, petitioner's counsel renewed the request for inspection by the trial judge of the grand jury minutes "to ascertain if there is any impeaching matter therein * * *" (II R. 178). The government noted that no reference to grand jury testimony had been made by either party during the examination of the witness (II R. 179). The trial judge denied the request (II R. 179), stating that he did not know whether it had been transcribed, but that, in any event, he was not going to review it. He further stated (II R. 179–180):

> In my opinion, I thought she told a pretty straight story. I mean, there's some trivial matters in there, of course, that's a matter for the jury * * *. I didn't see any glaring inaccuracies in the statement she gave you. This woman was on the stand for the equivalent of over half a day, and over and over, and repeated over and over, the same thing. Of course, I'm sure on any witness you're going to find some minor differences, but, generally speaking, I thought the story she told to the prosecution was substantially what she told you.

Subsequently, during argument on petitioner's motion for a new trial, the judge suggested that in at least half the criminal cases no notes of the testimony before the grand jury are taken (II R. 393). The government's view was that notes were not taken in seventy-five percent of the cases (II R. 394).

The court of appeals held that (III R. 7–8) "[i]n the instant case, it is inconceivable to us that there was any reason why the trial judge, in the interests

of justice, shall be compelled to examine the transcript of the testimony of Janice Escalanti before the grand jury." The court noted that the complaining witness was minutely cross-examined on the basis of statements she made to the F.B.I. and the St. Louis police; that there was no dispute as to the transportation; and that the only controverted issue was whether petitioner had sexual relations with her on the trip. On this issue the court said that there was no reason to suspect that the grand jury testimony would differ in any material respect from the trial testimony as no indictment would have been returned unless the girl testified that she had had sexual relations with petitioner. The court concluded that there was no abuse of discretion in refusing to examine grand jury testimony "in a hunt for possible inconsistencies" (III R. 8).

ARGUMENT

Petitioner claims that the trial court, whenever requested by the defense, must look at grand jury testimony for material which may impeach an important government witness. It is the government's position that there is no such automatic rule, and that, in this particular case, the refusal by the judge to stop the trial and to search the transcript of the grand jury proceedings for impeaching material was proper.

Rule 6(e) of the Federal Rules of Criminal Procedure, which was promulgated by this Court in 1946 after approval by Congress, committed the disclosure of grand jury minutes to the discretion of the trial

court in conformity with the traditional practice. Subsequently, Congress in enacting the so-called "Jencks" statute, 18 U.S.C. 3500, indicated its opposition to having the trial judge automatically turn over grand jury minutes after a witness has testified, by sharply criticising the decision (*United States* v. *Rosenberg*, 245 F. 2d 870 (C.A. 3)) in which such production had been ordered. See S. Rep. No. 981, 85th Cong., 1st Sess., pp. 3, 10; 103 Cong. Rec. 15933. Both the majority and minority opinions of this Court in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400, 403–404, recognized that production of grand jury minutes was controlled by Rule 6(e) and was not required by the "Jencks" Act.[4]

Moreover, as we read the *Pittsburgh Plate Glass Co.* decision, the whole Court agreed that, before grand jury minutes should be ordered turned over to the defense, a particularized need must be shown; the majority and minority differed only as to the application of the rule to the facts of that case. The Court did not decide whether, preliminarily, the judge must look at the testimony of a witness in order to decide whether his grand jury testimony must be turned over. We think, however, that it is implicit in the *Pittsburgh Plate Glass* ruling that

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[4] It has long been recognized that different considerations control the production of grand jury minutes from those concerning the production of government documents. Compare the late Judge Hand's comments on the production of grand jury minutes in *United States* v. *Garsson*, 291 Fed. 646, 649 (S.D. N.Y.), and of government documents in *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2).

where, on the facts of a given case, no particularized need for the grand jury testimony of a witness is shown, the trial judge is not required to examine the grand jury testimony of the witness merely to determine whether there might be some inconsistencies with his testimony at the trial. *Jackson* v. *United States,* No. 16,342, C.A. D.C., decided November 2, 1961; *Pittsburgh Plate Glass Co.* v. *United States,* 260 F. 2d 397 (C.A. 4), affirmed without deciding this issue, 360 U.S. 395; *Parr* v. *United States,* 265 F. 2d 894 (C.A. 5), reversed on other grounds, 363 U.S. 370; *Travis* v. *United States,* 269 F. 2d 928 (C.A. 10), reversed on other grounds, 364 U.S. 631.

In this case, there was no particularized need for the grand jury testimony and therefore no occasion to require the judge to look at the minutes to evaluate their worth for impeachment. The only material fact in issue at petitioner's trial was whether petitioner had intercourse with a fourteen-year-old girl. As the court of appeals noted, it was "inconceivable" that this would be controverted by the girl's testimony before the grand jury since otherwise no indictment would have been returned. Moreover, the trial record shows only inconsequential deviations in this young girl's testimony despite extensive cross-examination based not only on her prior statements to the F.B.I. and St. Louis police, but also on a full transcript of her testimony in a previous trial.

It is true, as petitioner indicates, that the Court of Appeals for the Second Circuit has taken a different approach to the problem. The Second Circuit has held that the trial judge must, on the request of

the defendant, look at the grand jury testimony of any prosecution witness and turn over those parts which contain inconsistencies. *E.g., United States* v. *Giampa,* 290 F. 2d 83, 85 (C.A. 2). The surface conflict of decisions may, however, be explained in part by regional differences in procedure. In New York, grand jury testimony is normally transcribed. On the other hand, except for particular types of investigations—such as antitrust actions—relatively little grand jury testimony is recorded in other parts of the country. The Assistant United States Attorney estimated during petitioner's trial that in the Eastern District of Missouri no notes of grand jury testimony are taken seventy-five per cent of the time (II R. 394) (see the discussion of this difference in practice between New York and the rest of the country in *Federal Rules of Criminal Procedure with Notes and Proceedings of the Institute,* New York University School of Law, 1946, pp. 178–180). Thus, in New York, a rule requiring the judge to examine grand jury testimony on request would apply to every defendant. In other areas, in contrast, there would be marked inequality between defendants—as the trial court suggested in this case (II R. 393)—depending on whether a stenographer happened to be present during the grand jury proceedings. For this reason, we do not think that there is any real conflict between the general Second Circuit rule and that of other circuits, such as to require resolution by this Court. In particular, we submit that any difference between the two rules does not call for resolution in this case

where the grand jury testimony of the girl could have very little significance because (1) petitioner controverted only the narrow issue whether he had had intercourse with her, (2) she was subject to a searching examination at the trial on the basis of her prior statements and testimony, and (3) her trial testimony revealed no need for further probing.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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